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The Soldiers' and Sailors' Civil Relief Act of 1940

As Related to Proceedings Affecting Titles to Real Estate

By PERCY S. MORRIS*

The Soldiers' and Sailors' Civil Relief Act is again with us and we lawyers will have our problems—or shall I say our headaches?

It was enacted in 1918 because of the emergency arising from the World War then being carried on. Public Resolution No. 96, 76th Congress, commonly called the National Guard Act, approved August 27, 1940, and the Selective Training and Service Act of 1940, approved September 16, 1940, contained sections providing that the benefits of the Act of 1918 were extended to all persons inducted into military service under such resolution or under such Act, with the exception of the provisions relating to insurance policies and to taxes and to public lands.

On October 17, 1940, there was approved by the President, effective immediately, the Soldiers' and Sailors' Civil Relief Act of 1940. This Act was a re-enactment of the 1918 Act with a few changes of comparatively minor importance and included the provisions of the 1918 Act relative to insurance policies, taxes and public lands. This Act, by its terms, is applicable in favor of all persons in military service of the United States no matter how or when inducted therein.

Summaries of the provisions in the 1918 and 1940 Acts are contained in the articles by Louis A. Hellerstein which appeared in the October and November, 1940, issues of DICTA. Decisions construing and applying the 1918 Act may be found in the notes to Federal Statutes Annotated, 2nd Edition, 1918 Supplement and in subsequent supplements and in a note appearing in 9 A. L. R. 81 and in the A. L. R. "Blue Book" of later decisions.

The purpose of both the 1918 Act and the 1940 Act was to enable persons in the military service of the United States to devote their entire energy to the defense needs of the nation without their being harassed and injured in their civil rights during their term of service and to prevent undue advantage being taken of them because of their absence in the military service and resulting inability to protect their civil rights. No person in military service is discharged or released from any legal liability or obligation by the provisions of these Acts. Continental Jewelry Co. vs. Minsky (Me.), 111 Atl. 801. Their effect is to protect

*Of the Denver Bar.

and preserve the rights and defenses of persons in the military service until after the expiration of their service.

The provisions of both the 1918 Act and the 1940 Act relating to proceedings affecting title to real estate concern procedure in securing judgment by default in suits, which would include actions to foreclose and suits to quiet title, stays of such suits, the vacating or setting aside a default judgment in such suits, the extension of periods of limitation for the bringing of action, the repossession of property for non-payment of installments of purchase price and the procedure necessary to foreclose by sale under power of sale.

APPLICATION OF ACT

Section 102 of the 1940 Act says that the provisions of the Act shall apply to the United States, the several states and territories, the District of Columbia and all territory subject to the jurisdiction of the United States and to proceedings commenced in any court therein and shall be enforced through the usual forms of procedure obtaining in such courts or under such regulations as may be by them prescribed, and that when under the Act any application is required to be made to a court in which no proceeding has already been commenced with respect to the matter, such application may be made to any court.

VALIDITY

The validity of the 1918 Act has been upheld in decisions which held that Congress has power to regulate proceedings in state courts by virtue of its power to wage war and that the provisions of the Act supersede the state statutes. Clark vs. Mechanics' American National Bank, 282 Fed. 589; Erickson vs. Macy (N. Y.), 131 N. E. 744; Kosel vs. First National Bank (N. D.), 214 N. W. 249; Pierrard vs. Hoch (Ore.), 191 Pac. 328.

CONSTRUCTION

The Supreme Court of the United States has ruled in Ebert vs. Poston, 266 U. S. 548, that the Act is not, by construction, to be expanded to include transactions supposed to be within its spirit but which do not fall within any of its provisions in the following language:

> "There is a further contention that the broad purpose of the Act declared in section 100 demands that it be liberally construed to include the situation presented by this case. * * * This Act is so carefully drawn as to leave little room for conjecture. It deals with a single subject and does so comprehensively, systematically, and in detail. There are in the Act an aggregate of 36 sections and 27 subsections. To insure certainty, separate provision is made

for each of the several classes of transactions to be dealt with and for the situations likely to arise in each. To promote clarity, the Act is divided into six articles, each dealing with a different branch of the subject. * * * Such care and particularity in treatment preclude expansion of the Act in order to include transactions supposed to be within its spirit, but which do not fall within any of its provisions."

In Bolz Cooperage Corporation vs. Beardslee (Mo. App.), 245 S. W. 611, it was held that the phrase "persons in military service" does not include corporations and that therefore a corporation was not entitled to an extension under Section 205 of the statutory time within which to file a claim against the estate of a decedent on the ground that its agent, who had knowledge of the facts upon which the claim was based, was in the military service.

And in Halle vs. Cavanaugh (N. H.), 111 Atl. 76, it was held that said Section 205 does not extend the time for the bringing of an action by one in military service in his capacity of executor of an estate.

DEFAULT JUDGMENTS

Subdivision 1 of Section 200 provides that in any action or proceeding commenced in any court, if there shall be a default of any appearance by the defendant, the plaintiff before entering judgment shall file an affidavit setting forth facts showing that the defendant is not in military service or, if unable to file such affidavit, he shall in lieu thereof file an affidavit setting forth either that the defendant is in the military service or that plaintiff is not able to determine whether or not defendant is in such service; this subdivision further provides that if an affidavit is not filed showing that the defendant is not in the military service, no judgment shall be entered without first securing an order of court directing such entry and that no such order shall be made, if the defendant is in such service, until after the court shall have appointed an attorney to represent defendant and protect his interest, and that the court shall on application make such appointment.

Therefore, before any judgment by default may be entered hereafter, the plaintiff must file as to each defendant against whom the default judgment is to be entered an affidavit which is to be in one of three forms: either one setting forth facts showing that such defendant is not in the military service; or one stating that such defendant is in the military service; or one stating that plaintiff is not able to determine whether or not such defendant is in military service.

An affidavit stating merely that the defendant is not in military service is not sufficient to comply with the statute because the statute

requires that such an affidavit set forth *facts* showing that the defendant is not in military service; therefore such an affidavit should state in detail the facts which have been ascertained which show that the defendant is not in military service; the other two forms of affidavit are comparatively simple as they need merely state either that the defendant is in military service or that plaintiff is not able to determine whether or not defendant is in military service. There is no reason why one affidavit may not be filed covering all defendants in default and combining more than one of the prescribed forms.

Also, under this subdivision, unless an affidavit is filed setting forth facts showing that the defendant against whom the judgment is to be entered is not in military service, no order directing the entry of the judgment is to be made if the defendant is in such service until after the court shall have appointed an attorney to represent his interest. It is to be noted that this subdivision requires the appointment of an attorney in all cases where a defendant *is* in the military service; it does not confine the necessity for appointment of an attorney to cases in which it appears from the affidavit that the defendant is in military service. So that, where it is not known whether the defendant is or is not in military service, the defendant might be in such service and, if he was, then by a strict construction of the Act the judgment would be invalid without the appointment of an attorney. This is the reason for the adoption by the Denver District Court of the provision in the rule which is hereinafter set out to the effect that an attorney is to be appointed where it does not appear from the affidavit that the defaulting defendant is not in military service.

Where personal service of summons is had upon a defendant, the plaintiff will quite likely be able to learn the facts as to whether or not such defendant is in military service and therefore to file an affidavit which states that he is in military service or an affidavit setting forth facts showing that he is not in military service. But in cases where personal service of summons is not had upon a defendant, such as actions in rem and particularly those affecting real estate, a different situation is presented because in most of this class of cases the whereabouts of at least some of the defendants is unknown and therefore plaintiff cannot determine whether or not such defendants are actually in military service; and in cases where unknown persons are defendants it is clear that plaintiff is unable to determine whether such unknown persons are in military service and, as a matter of fact, some of them, such as heirs or devisees, might actually be in military service. Therefore, in this class of cases there must not only be filed an affidavit stating that as to these defendants plaintiff is unable to determine whether they are in military service, but also an attorney must be appointed by the court to represent such defendants, both known and unknown.

In compliance with this subdivision, the District Court of the City and County of Denver has adopted, effective November 1, 1940, Special Rule No. 3, which is as follows:

> "Before a default judgment is entered, the plaintiff shall file in the court an affidavit setting forth facts showing that the defendant is not in military service of the United States or, if unable to file such affidavit, the plaintiff shall in lieu thereof file an affidavit setting forth either that the defendant is in such military service or that plaintiff is not able to determine whether or not defendant is in such service. Before entering a default judgment the court shall appoint an attorney to represent any and all defendants in default, who are or may be in such military service, and protect their interests. Such appointment shall be made upon application of plaintiff, but if no such application be made the Court shall make the appointment on its own motion. Provided, however, no such appointment shall be made if it appears from the affidavit filed by the plaintiff that the defaulting defendant is not in such military service. The Court may, in its discretion, allow a fee to such attorney not to exceed $10.00, to be taxed and paid by the plaintiff as a part of his costs. This rule shall take effect as of November 1, A. D. 1940."

The affidavit should be filed after the time for appearance of the defendants named therein has expired and prior to the entry of the judgment by default. If an attorney is to be appointed, the appointment should be made during that period. In Mader vs. Christie (Calif. App.), 198 Pac. 45, it was held that the affidavit may be filed after entry of default if filed before entry of the judgment.

In several cases the courts have held that the failure to comply with the same provisions of the 1918 Act with regard to filing an affidavit as to military service of the defendant before entry of default judgment does not affect the validity of the judgment unless the defendant actually was in military service at the time and that such failure cannot be taken advantage of by a defendant who was not in military service at that time. Howie Mining Co. vs. McGary, 256 Fed. 38; Harrell vs. Shealey (Ga. App.), 100 S. E. 800; Alzugaray vs. Onzurez (N. Mex.), 187 Pac. 549; Mader vs. Christie (Calif. App.), 198 Pac. 45; Eureka Homestead Soc. vs. Clark (La.), 83 So. 190. See also the following: Wells vs. McArthur (Okla.), 188 Pac. 322; Bulgin vs. American Law Book Co. (Okla.), 186 Pac. 941; State, ex rel. Smith vs. District Court (Mont.), 179 Pac. 831.

Said subdivision 1 of Section 200 gives power to the court before entry of default judgment, where it does not appear that the defendant

against whom the judgment is to be entered is not in military service, to require the filing by plaintiff of a bond conditioned to indemnify such defendant, if in military service, against any loss or damage that he may suffer by reason of the judgment, if such judgment shall thereafter be set aside in whole or in part. And such subdivision further authorizes the court to make such other and further order or to enter such judgment as in its opinion may be necessary to protect the rights of the defendant under the Act.

By subdivision 3 of said section, it is provided that where a person in military service is a party and does not personally appear and is not represented by an authorized attorney, the court may appoint an attorney to represent him, and in such case a like bond may be required and order made to protect his rights, but that no attorney appointed under the Act to protect a person in military service shall have power to waive any right of such person or bind him by his acts.

SETTING ASIDE OF JUDGMENTS

Subdivision 4 of the same section provides that if any judgment shall be rendered in any action or proceeding governed by such section against any person in military service during the period of such service or within thirty days thereafter, and it appears that such person was prejudiced by reason of his military service in making his defense thereto, such judgment may, upon application made by such person or his legal representative not later than ninety days after the termination of such service, be opened by the court rendering the same and such defendant or his legal representatives let in to defend, provided that it is made to appear that the defendant has a meritorious or legal defense to the action or some part thereof. Therefore, no matter what kind of an affidavit may be filed and no matter what kind of an order or judgment may be made, a judgment by default entered at any time after the effective date of the applicable resolution or Act may be set aside if application therefor is made by the defendant or his legal representatives before the expiration of ninety days after the termination of the military service of such defendant if three things are shown, to-wit: first, that at the time of the entry of the judgment such defendant was in the military service; second, that he was prejudiced by reason of his military service in making his defense; and, third, that he has a meritorious or legal defense to the action or some part thereof. Said subdivision 4 then contains a very important saving clause to the effect that the vacating, setting aside or reversing any judgment because of any provisions of the Act shall not impair any right or title acquired by any bona fide purchaser for value under such judgment.

There is a question as to whether, when a defendant who was in military service when the default judgment was rendered applies to have the judgment set aside, on the ground that no affidavit as to his military service was filed, he must show that he has a meritorious defense. In Combs vs. Combs (N. C.), 104 S. E. 656, the court refused to set aside a default judgment in a divorce case, where the defendant had been in military service when the judgment was entered and no affidavit as to military service had been filed, on two grounds: first, because he made his motion more than the ninety days after the termination of his service and, second, because:

> "It is nowhere made to appear that the defendant has a meritorious or legal defense to the action. In his affidavit the defendant fails to set out that he has any defense to the cause of action as stated in the complaint. While he declares that he has a good and meritorious defense to said action, he fails to set out what that defense is. The statute says that it must be made to appear that the defendant has a meritorious or legal defense. It is not left to the defendant to say that his defense is meritorious or legal, but it must be made to appear so to the judge of the court; for that reason the defendant is required to set out the facts constituting his defense."

Statements that, where an affidavit as to military service is not filed, the defendant would have to show a meritorious defense in order to have the default judgment reopened are contained in Eureka Homestead Soc. vs. Clark (La.), 83 So. 190, and Schroeder vs. Levy, 222 Ill. App. 252, in neither of which cases was an actual application to set aside the judgment made or involved. The effect of the decision in Combs vs. Combs is that, where the affidavit was not filed, the defendant cannot have the judgment set aside or reopened upon showing merely that he was in military service when it was entered and that no affidavit as to his military service was filed, but that he must make the same showing that he would have to make if the affidavit had been filed, namely: that he was in military service when the judgment was rendered or within thirty days prior thereto, that he was prejudiced by reason of his military service in making his defense and that he has a meritorious or legal defense; in other words, that the result is the same whether the affidavit is filed in compliance with the Act or not. For this reason it is not unlikely that there may be rendered decisions contrary to that in Combs vs. Combs upon the ground that when Congress directed that the affidavit must be filed it meant that a failure of a plaintiff to file it should entitle the defendant to set it aside upon showing nothing more than his military service and the failure to comply with the Act by filing the affidavit and that a violation of the provisions of the Act with regard to filing the affi-

davit should result in some penalty upon or disadvantage to the plaintiff instead of leaving him in exactly the same position as if he had complied with the Act.

All of these provisions of Section 200 relate exclusively to judgments entered by default and there is nothing anywhere in the Act which in any way impairs the validity or effect of a judgment against a defendant who has entered an appearance in the action.

STAY OF ACTION OR PROCEEDING

Section 201 provides that at any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may in the discretion of the court in which it is pending on its own motion and shall on application to it by such person or someone on his behalf be stayed as provided in the Act, unless in the opinion of the court the ability of the plaintiff to prosecute the action or of the defendant to conduct his defense is not materially affected by reason of his military service.

By Section 204, it is provided that any stay of any action, proceeding, attachment or execution ordered by any court under the provisions of the Act, may, except as otherwise provided, be ordered for the period of military service and three months thereafter or any part of such period and subject to such terms as may be just, whether as to payment in installments of such amounts and at such times as the court may fix or otherwise. It is to be noted that no blanket stay is given by the Act in favor of persons in military service and that no automatic stay is provided for, but that, in each instance, whether the stay is to be granted or not is left to the discretion of the court in the light of the facts, particularly with regard to whether the ability of the party in military service to prosecute or defend the action or to pay the obligation or judgment is materially affected by his military service.

Said Section 204 further provides that where the person in military service is a co-defendant with others, the plaintiff may nevertheless, by leave of court, proceed against the others.

EXTENSION OF PERIODS OF LIMITATION

Section 205 is a short section, but involves many questions. It provides that the period of military service shall not be included in computing any period now or hereafter to be limited by law for the bringing of any action by or against any person in military service or by or against his heirs, executors, administrators or assigns, whether such cause of action shall have accrued prior to or during the period of such service. In Clark vs. Mechanics American National Bank, 282 Fed. 589, it was

held that this section extended the period provided by statute for the bringing of a suit to foreclose a mechanic's lien. In the light of this last decision, attorneys may not be safe in passing titles to real estate because no notice of filing of a suit to foreclose a mechanic's lien has been filed within the six months provided by the Colorado mechanic's lien statutes, if any part of such six months is subsequent to August 27, 1940, because the mechanic's lien claimant might have entered military service before the expiration of the six months. Therefore, if a mechanic's lien claim is paid or compromised, a release thereof should be recorded. These observations of course do not apply where the mechanic's lien claimant is a corporation, because, as already stated, a corporation cannot be considered to be in military service.

The United States Supreme Court held in Ebert vs. Poston (supra), 266 U. S. 548, that this Section 205 granting a general extension of limitation periods cannot be the basis of extending the period of redemption from a sale by advertisement, since this section does not apply to transactions which are effected without judicial action and the statutory right to redeem from a sale by advertisement is not a right of action, but is a primary right as distinguished from a remedy. The Alabama and Minnesota Supreme Courts have held to the same effect. Wood vs. Vogel, 87 So. 174; Taylor vs. McGregor State Bank, 174 N. W. 893. While in all of these cases the sale had been made before the enactment of the Act and before the commencement of military service of the owner and while no decision has been found on this point where the sale was made after the enactment of the Act and after the commencement of military service of the owner, the language of the courts in these three decisions is just as applicable to redemptions from the latter class of sales as from the former class. It therefore seems clear that the right to redeem from a sale is not extended by this section, but that this section applies only to the period in which an action in court is to be brought.

Similarly this section would not operate to extend the lien of a transcript of judgment beyond the period of six years from the entry of the judgment specified by the Colorado statute. This is because such six years is not a "period * * * limited by any law for the *bringing of any action*" (which, under the decision in Ebert vs. Poston, supra, means an action in court) and no "cause of action" is involved.

This section, however, would seem to be applicable to all of the Colorado statutes limiting the time for bringing of suit, including those contained in the so-called curative statutes relating to titles to real estate, if the appropriate period of limitation had not expired before the person affected by the statute entered military service or before the effective date of the Act if he enterd military service before that date.

It is to be noted that Section 205 extends the time not only for the

bringing of suits by persons in military service, but also for the bringing of suits against persons in military service. The Act was so applied to extend the period of limitation in favor of the plaintiff in military service in Kosel vs. First National Bank (N. D.), 214 N. W. 249; Bell vs. Baker (Tex. Com. of App.), 260 S. W. 158; and Lewis vs. Anthony Republican Pub. Co. (Kan.), 208 Pac. 254.

INSTALLMENT SALES

Section 301 relates to repossession of property for non-payment of installments. It provides that no person who prior to the date of approval of the Act has received or whose assignor has received under a contract for the purchase of real or personal property or of lease or bailment with the view to purchase of such property a deposit or installment of the purchase price from a person or from the assignor of a person who, after the date of payment of such deposit or installment, has entered military service shall exercise any right or option under such contract to rescind or terminate the contract or assume possession of the property for non-payment of any installment falling due during the period of such military service, except by action in a court of competent jurisdiction.

In order for this section to be operative three conditions must exist: a deposit or installment of the purchase price must have been paid before the effective date of the Act; the person paying such deposit or installment or his assignee must have entered military service after the payment of such deposit or installment; and at least one of the delinquent installments must have fallen due during the period of such military service. There then follows a saving clause to the effect that such contract may be modified, terminated or cancelled and the property may be repossessed or retained by the seller pursuant to a mutual agreement of the parties thereto or their assignees if such agreement is executed in writing subsequent to the making of such contract and during or after the period of military service of the person concerned.

The same section provides that the court may order the repayment of prior installments or deposits or any part thereof as a condition of terminating the contract and resuming possession of the property, or may in its discretion on its own motion and shall (except with regard to motor vehicles) on application to it by such person in military service or someone on his behalf order a stay of proceedings, unless in the opinion of the court the ability of the defendant to comply with the terms of the contract is not materially affected by reason of such service, or it may make such other disposition of the case as may be equitable to conserve the interests of all parties. It is to be noted that this section relates to contracts of purchase and does not apply to mortgages or deeds of trust.

MORTGAGE OBLIGATIONS

The section relating to mortgage obligations is Section 302. Subdivision 1 of this section recites that the provisions of this section apply only to obligations originating prior to the date of approval of the Act and secured by mortgage, trust deed or other security in the nature of a mortgage upon real or personal property owned by a person in military service at the commencement of the military service and still so owned by him. Therefore, an encumbrance secured by an obligation originating after October 17, 1940, the effective date of the Act, is not within the provisions of this section. Also, no encumbrance is within the provisions of this section, unless the property covered by the mortgage or an interest therein was owned by a person in military service at the time he entered such service and has continued at all times since then to be owned by him.

Subdivision 2 of this section provides that in any proceeding commenced in any court during the period of military service to enforce the obligation secured by an encumbrance falling within the terms of the section arising out of non-payment of any sum thereunder due or out of any other breach of the terms thereof occurring prior to or during the period of such service, the court may after hearing in its discretion on its own motion and shall (except as to motor vehicles) on application to it by such person in military service or someone on his behalf, unless in the opinion of the court the ability of the defendant to comply with the terms of the obligation is not materially affected by reason of his military service, stay the proceedings or make such other disposition of the case as may be equitable to conserve the interests of all parties.

SALES UNDER POWERS OF SALE

Subdivision 3 of this Section 302 contains provisions relating particularly to foreclosures, not through suit, but through sale made under power of sale of real estate under deeds of trust to the Public Trustee and of personal property under chattel mortgages. This section provides that no sale under a power of sale or under a judgment entered upon warrant of attorney to confess judgment contained in any such obligation shall be valid if made during the period of military service or within three months thereafter unless upon an order of sale previously granted by the court, and a return thereto made and approved by the court.

Under this section, if a sale is made of real estate pursuant to the power of sale contained in a deed of trust to the Public Trustee, or if a sale is made of chattels pursuant to the power of sale contained in a chattel mortgage, such sale is not valid if at the time thereof any person interested in the title to the property sold was in military service or had

been in military service less than three months before the sale unless an order of sale is previously granted by the court and a return thereto made and approved by the court. The Massachusetts Supreme Court held in Hoffman vs. Charlestown Five Cents Sav. Bank, 121 N. E. 15, that where the owner of property, subject to encumbrance, expecting to be called for service, conveyed the real estate to his mother under an oral agreement that the property should be his unless he failed to return from the war, and that in that case it should be hers, and thereafter he entered military service and thereafter the property was sold under power of sale contained in the encumbrance, but without securing an order of court authorizing the sale, the sale should, upon his suit, be set aside because of failure to secure the order, and this in spite of the fact that he at the time of the sale did not have any interest of record and the owner of the encumbrance did not know or have reason to know that he had any interest in the land.

In this case the court said:

> "The section does not forbid the foreclosure of mortgages on property owned by persons in the military service of the United States. What the section does forbid is the foreclosure of such a mortgage under a power of sale (contained in it) 'unless (the sale under the power is made) upon an order of sale previously granted by the court and a return thereto made and approved by the court.' Clause 3 of section 302 was enacted to secure to every person in the military service of the United States who owns property subject to a mortgage within the act the relief to which he is entitled under the act. The defendant has urged against this construction of the section that if that be the true construction of it the result is that until the termination of the time specified in the act no mortgage can be foreclosed by any mortgagee except under an order of court, and it cannot be that that was the intention of Congress. We are of opinion that this is the result of the true construction of the act, for in that way alone can a mortgagee be certain that the foreclosure of his mortgage will not be made in violation of the act."

So that it is clear that the ruling of the court was that the foreclosure sale under power of sale was invalid because of two concurring facts: first, the owner of an equitable interest in the property was in military service, even though his interest did not appear of record and was unknown to the mortgagee: and, second, the order authorizing the sale was not obtained. But from the language quoted from the decision, it is clear that the court would have sustained the sale if the order authorizing sale had been secured and return of the sale had been made to and approved by the court, even though the owner of an equitable interest in the property was in military service.

In another case the same court said that it is well settled that during the time the Act is in force a mortgagee forecloses under a power of sale contained in a mortgage at his own peril, unless upon an order of sale previously granted by the court and return thereto made and approved by the court, and that while a sale is not necessarily bad, it is of no validity, if made during the military service of an owner or within three months thereafter if made without such order, return of sale and approval. John Hancock Mutual Life Ins. Co. vs. Lester, 125 N. E. 594. And in a later case the same court said that the safe course for the mortgagee is to foreclose his mortgage (which was one with power of sale) under the order of a court, and the court then said: "It is only by pursuing that course that he gets a record title not open to successful attack under the said Act of Congress, and therefore in that way alone can he be certain that the foreclosure of his mortgage will not be made in violation of that Act." Morse vs. Stober, 123 N. E. 780, 9 A. L. R. 78.

Since the records do not show anything as to military service of the persons interested in the title to the property, no attorney should hereafter conduct a sale of any real property under a power of sale without first securing the order of court authorizing such sale. It is to be noted that the statute requires not only such order authorizing the sale, but also that a return of the sale be made to the court and be approved by the court.

If the requirements of this subdivision as to order authorizing sale, return of sale and approval thereof be complied with, the title derived through such sale will not be rendered invalid if it later appears that an owner of the property was in military service at the time of the sale; in this respect, there is a difference between the provisions of the Act regarding judgments and the provisions of this subdivision regarding sales under powers of sale; the Act gives the court power to set aside a default judgment on application made before the expiration of three months after the termination of military service upon showing the matters already mentioned in discussing that phase of the matter, but the Act does not authorize the setting aside of a sale under a power because of an owner of the property being in military service, if the order authorizing the sale is secured and return of sale is made to and approved by the court. Also, as already stated, the Act does not operate to extend the period of redemption. So that upon compliance with this subdivision, a title can be derived through foreclosure sale under power of sale which will not be affected in any way by any of the provisions of the Act.

The Colorado Supreme Court has adopted Rule No. 120, effective November 1, 1940, which provides a simple and inexpensive method of procdure for the obtaining of the order authorizing the sale under power of sale, the return of the sale to the court and the approval thereof by the

court in compliance with this subdivision of the Act. This rule is as follows:

"RULE 120. ORDERS AUTHORIZING SALES UNDER POWERS.

"(a) Motion and Notice. Whenever by law an order of court is required authorizing a sale under a power of sale contained in an instrument, any interested person may file a motion, verified by the oath of such person or of someone in his behalf, in any court of record asking for such order; such motion shall describe the instrument containing the power and the property sought to be sold thereunder and shall state the names of the persons having any interest in such property and shall state the address of each such person or shall state that his address is unknown. The court shall by order fix a time and place for the hearing of such motion. The clerk shall issue a notice containing a description of the instrument and of the property sought to be sold thereunder and the time and place of the hearing and shall state that an order is asked authorizing a sale of said property under such power of sale. Such notice shall be served by the clerk mailing, not less than ten days before the hearing, a copy thereof to each person stated in the motion as having any interest in such property whose address is stated in such motion and by the clerk posting, not less than ten days before the hearing, a copy thereof in a prominent place in his office. Such mailing and posting shall be evidenced by the certificate of the clerk.

"(b) Sales of Real Estate. Provided, however, that when the property to be sold is real estate and the power of sale is contained in a deed of trust to a Public Trustee, the motion need state the names of only those persons who have any record interest in such real estate and the address of each such person as such address is given in the recorded instrument of writing and copies of the notice need be mailed only to each person so named in the motion whose address is so stated. If such recorded instrument of writing does not give such address no copy of the notice need be mailed to the particular person whose address is not so given; provided, however, that where only the county and state is given as the address of such person, then the copy of the notice shall be mailed to the county seat of such county.

"(c) Hearing and Order. No motions or pleadings shall be required or permitted to be filed by anyone other than the person who filed the motion for the order authorizing the sale. At the time and place set for the hearing or to which the hearing may be continued, the court shall examine such affidavits as may have been filed and hear such testimony as may be offered and shall then summarily determine the motion and grant or deny said motion and

enter an order accordingly. At any time before the entry of such order the court may require such additional notice to be given as it may see fit.

"(d) Return of Sale. The court shall require a return of such sale be made to the court for its approval.

"(e) Docket Fee. A docket fee of $5.00 shall be paid by the person filing such motion."

It will be noted that under this rule, where the property to be sold is real estate and the sale is to be made under the power of sale in a deed of trust to the Public Trustee, the names and addresses of the persons having any interest in the property to be sold which are to be stated in the motion and to which the clerk is to mail copies of the notice are exactly the same as the names and addresses given to the Public Trustee for the mailing by him of copies of the notice of Public Trustee's sale, since the rule in this connection follows practically word for word the statute which provides for the mailing of notices of the Public Trustee's sale to persons having a record interest in the property.

As will be seen from what has already been stated, the provisions of this subdivision apply only to obligations originating prior to the date of approval of the Act and encumbrances secured by such obligations so that none of the procedure that has been mentioned for a sale under power of sale need be followed if the encumbrance secures an obligation which originated after October 17, 1940, which was the date of the approval of the 1940 Act.

SALES UNDER CONFESSION JUDGMENTS

This subdivision also makes the same requirements for a sale under a judgment entered upon warrant of attorney to confess judgment contained in an obligation secured by encumbrance on real or personal property which I have already discussed with reference to sales under powers of sale.

MISCELLANEOUS

There are other subdivisions in the Act relating to matters that do not affect titles to real estate. These are provisions authorizing the court to extend to sureties, guarantors, endorsers, etc., the benefits of any stay or postponement or extension or vacation of judgment granted under the Act, provisions relating to relief from penalties for non-performance of obligations, provisions authorizing the court to grant a stay of execution and to vacate or stay an attachment or garnishment, provisions relating to eviction or distress for non-payment of rent, provisions prohibiting stay of proceedings to resume possession of a motor vehicle, tractor or accessories under a purchase money mortgage, conditional sales contract

or lease or bailment with view to purchase, unless fifty per cent or more of the purchase price has been paid, provisions relating to the government assuming payment of premiums on insurance policies of an aggregate face amount not exceeding $5,000 on lives of persons in military service, provisions giving persons in military service an extension to a date six months after the termination of their military service of the time to redeem from sale for taxes property occupied by them or their dependents and provisions granting extensions of time to do various acts in connection with public lands.

Section 600 provides that where in any proceeding to enforce a civil right in any court it appears to the satisfaction of the court that any interest, property or contract has since the date of the approval of the Act been transferred or acquired with intent to delay the just enforcement of such right by taking advantage of the Act, the court shall enter such judgment or make such order as might lawfully be entered or made, notwithstanding the provisions of the Act to the contrary.

Section 601 provides that in any proceedings under the Act a certificate signed by certain respective military authorities shall be prima facie evidence as to a person named in such certificate having not been, being or having been in military service and details thereof.

Section 602 provides that any interlocutory order made by any court under the provisions of the Act may, upon the court's own motion or otherwise, be revoked, modified or extended by it upon such notice to the parties affected as it may require.

Section 604 provides that the Act shall remain in force until May 15, 1945, provided that should the United States be then engaged in a war, it shall remain in force until the war is terminated and for six months thereafter. We therefore shall have the provisions of the Act with us for a long time, and it is imperative that each attorney should carefully study the various provisions of the Act and use the utmost care to comply with them.

NOTICE

The Colorado Supreme Court has under consideration the proposed Rules of Civil Procedure for courts of record in Colorado, recently submitted and recommended for adoption by the Committee on Rules of Civil Procedure of the Colorado Bar Association.

The court will be pleased to give attention to objections to the proposed rules or comments thereon by members of the bar, if communications pertaining thereto are addressed to the Clerk of the Supreme Court so as to be received by him on or before December 14, 1940.

BENJAMIN C. HILLIARD, *Chief Justice.*

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Denver, Colo.

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CALENDAR

January, 1941.....Annual Meeting Colorado Association of District Attorneys
March 17, 18.....Mid-Winter Meeting A. B. A. House of Delegates
September 22.....Annual Meeting Commissioners on Uniform Laws
Sept. 29-Oct. 4.....Annual Meeting American Bar Association, Indianapolis, Indiana

Jurisdiction of Referee in Bankruptcy Over Non-Dischargeable Claims

By WM. HEDGES ROBINSON, JR.

The jurisdiction of the referee in bankruptcy over a creditor of the bankrupt depends upon the nature of the claim asserted by the creditor against the bankrupt according to the principle established in the recent case of *In re Martinez* (C. C. A. 10th, No. 2089, decided October 21, 1940, rehearing denied November 19, 1940). In this case the bankrupt applied in writing for a loan from the Personal Finance Company of Colorado. In this written application he made certain representations concerning his financial status and ability to repay the loan.

These representations were materially false and the creditor began an action in the state court during the pendency of the bankruptcy proceeding, seeking to recover damages from the bankrupt on account of the false pretenses and representations made by the bankrupt in his application. The referee promptly enjoined the company from further prosecution of the suit in court.

The company thereupon filed an application to vacate and set aside the restraining order, attaching to its application a copy of the verified complaint filed in the state court. The referee and federal district court denied the application. Upon appeal to the circuit court, Circuit Judge Phillips pointed out that Section 17 of the bankruptcy act (11 U. S. C. A., Sec. 35) provides that a discharge in bankruptcy would not release a bankrupt from a liability for obtaining money by false pretenses or false representations. Since in this case the claim asserted by the company against the bankrupt was one from which the bankrupt would not be released by a discharge in bankruptcy, it was error to enjoin the action in the state court. Therefore, the injunction against the company should be dissolved.

This decision reaffirms the principle asserted *In re Lawrence* (Dist. Ct. Ala.), 163 Fed. 131 (1908), wherein under similar circumstances the court held that in the event the state court suit was a bona fide proceeding for obtaining money by false pretenses or representations, the referee has "no jurisdiction to try the merits of the suit, but must remand the parties to the state court, and permit that court to pass upon the merits of the contention as to whether it is barred by the discharge in bankruptcy."

This case and a large number of cases which follow its basic principle clearly establish that dischargeability of the debt is the basis of the jurisdiction of the referee in bankruptcy over that particular debt and the

creditor asserting it. The question which these cases suggest and which remained unanswered until recently was: How is the question of jurisdiction of the referee to be determined in these cases where a suit is pending in a state court on a liability which the creditor asserts is non-dischargeable in bankruptcy?

Should the referee require the creditor to submit conclusive proof on the non-dischargeability of the claim? Should the referee require that the creditor submit such proof of the non-dischargeability of the claim as would be sufficient to withstand the test of a non-suit or directed verdict in the state court? Should the referee do anything more than to require the creditor to submit to him a copy of the verified complaint filed in the state court?

These questions, which arose by virtue of unanswered implications in *In re Lawrence*, were again suggested but left unanswered in the case of *Family Small Loan Company of Richmond vs. Mason* (C. C. A. 4, 1933), 67 Fed. (2) 207, wherein the court, reaffirming the principle of the Lawrence case, remarked: "Interesting questions discussed in the briefs as to whether the bankruptcy court should hear evidence on the nature of the debt where the pleadings in the state court show a debt that is not dischargeable, need not be considered, as here the court considered the evidence presented in the form of a stipulation by counsel; and this evidence, as well as the pleadings in the state court, showed a debt which was not dischargeable."

These questions have been answered, however, in the case of *In re Alvino* (C. C. A. 2, 1940), 111 Fed. (2) 642, which states that the lower court was in error in holding that the creditor should have submitted proof of fraud. The creditor "did enough when it showed the court a copy of the complaint filed in the action in the state court."

This decision presents the most satisfactory answer to the problem. If the creditor is faced with submitting conclusive proof of non-dischargeability of the claim before the referee, he is in fact forced to try his case in two courts on the same facts before he is entitled to relief. If the creditor is able to convince the referee on the order to show cause, he nevertheless is faced in the state court with the task of proving fraud in the inception of the obligation. Here the creditor may either lose or win the verdict, depending upon the host of things incident to the trial of a law suit, even though he has once conclusively proved his case. If he fails to convince the referee, he is faced with the principle of res adjudicata should he bring a suit in the state court after discharge. Any rule which is dependent upon the degree of proof to be submitted to the referee by the creditor on the dischargeability of the debt is subject to these same criticisms plus the additional problem of determining whether the proof meets the degree thought to be necessary by each individual referee.

The solution set forth in *In re Alvino* makes the matter a very simple and inexpensive one for both debtor and creditor. If the complaint in the state court unmistakably makes the action one in deceit for obtaining money by false representation or false pretense, the referee can immediately determine that he has no jurisdiction over the matter. Thus the entire issue of fraud is left properly with the state court to determine. If, on the other hand, it finds that there was not fraud in incurring the debt, the debtor is still protected by the adjudication and discharge in bankruptcy. If the state court finds that the debt was incurred by false pretenses or representations, the creditor is left to the remedies provided by the state law.

In the exercise of these remedies during the pendency of the proceedings in bankruptcy, the creditor must avoid, however, any interference with property under jurisdiction of the bankruptcy court. If the creditor attaches or in any manner interferes with the possession or control of property of the bankrupt properly within the jurisdiction of the bankruptcy court, then it must answer to that court for improper interference with the orderly administration of the estate of the bankrupt.

Edward J. Ruff

Reports on the Colorado Junior Bar Conference

It is too early in the year to report any active achievements, but an excellent start has been made toward one of the most successful years in the short history of the Conference. Committee chairmen and members have been appointed, the membership of each committee being subject to change by the chairman. The council posts have been filled from all eligible districts. By resolution at the annual meeting, the Conference chairmen of past years were made honorary council members without vote.

Several members of the Conference volunteered on October 16 to assist the various boards and commissions throughout the state in the registration under the Selective Service Act, and at the present time several are serving as advisors to the registrants.

The most urgent requirement at the present time is that all the members realize that there are a great number of younger lawyers in the state who are not members of the organization, and do their best to show these men the advantages of membership in the Conference.

In the past year the new members of the Conference were more than double its membership quota, and it is hoped that we can do as well, or better, this year.

The new council members and the committee personnel are as follows:

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Another Board Adopts an Intolerable Rule

It will be recalled that in the last Lawyer Service Letter attention was called to the recent manifestation of a reach for power by administrative boards in seeking to control and discipline attorneys representing private clients. In that letter such rules and regulations, which would either exclude or disbar an attorney deemed guilty by the board of "disrespectful" or "contemptuous" language or conduct, were condemned as intolerable, and the long history of the struggle of the bar to protect the individual rights of citizens was referred to.

The Social Security Board comes forward with a regulation purporting to authorize it to suspend or debar an attorney who, in the board's opinion, has misled any claimant or who has made or participated in the making of any false statement as to any material fact affecting the right of any person to benefit under the Social Security Act. Thus, the Social Security Board would be the final authority in branding an attorney as having misled his client or as having made a false statement affecting his client's rights.

This dangerous grasping for power over the legal profession has nothing to do with the personnel of any administrative board. Although the members of a given board may customarily act with circumspection, the question of power remains. The personnel of any board is subject to change; although the personnel at any given time may have one attitude toward attorneys, their successors may have an entirely different attitude. In other words, the fact that this power may not be abused at one time by some men is no guarantee that the same power will not be abused at another time by other men. Therefore, the power to discipline attorneys should not be possessed by any administrative board.

It would seem that this growing danger should be studied immediately by bar associations, to the end that the problem may receive widespread discussion. In this way sound conclusions may be arrived at with the result that the freedom of the legal profession, and the consequent welfare of the public, will not be jeopardized in any degree.

—New York Bar Lawyer Service Letter.

Taking Testimony of Draftees Before Their Induction Into the Service

Many millions have answered the call of our President to rally behind our defense program. Until the stated day when draftees must go away, is it not proper and fitting that they serve the cause of good government by preserving the principles of truth and justice on which it is founded? This they can do now by giving their testimony while they are able to do so, without any interference to the defense program. This very thing can and will be done in the federal courts and there is no reason why the same rule should not prevail in the state courts.

The testimony of every draftee should be taken as soon as an action is commenced. The right of cross-examination should be preserved. An attorney should have the right to require every draftee to appear before a notary public or commissioner of deeds while he can still do so and give testimony as to what he knows. It will save the time of the court because witnesses who know nothing will not be called at the trial. It will perpetuate the testimony of draftees who may later not be available at the trial. It will enable attorneys to properly prepare their cases for trial and they will not lose cases because their witnesses are away. A witness is the most valuable part of the administration of justice and he does not belong to either side. An immediate examination is very important while the mind and memory of the witness are still clear. His testimony two or three years later, if he is still available, and can be reached, is very often based on mere conjecture or speculation. Where the testimony of a witness has been taken in advance of the trial and he should later be unavailable because he has been drafted into the service and these facts are shown to exist, his testimony should be permitted to be used at the trial.

Motions for summary judgment will be more readily granted and more settlements will be effected in the face of strong testimony to support a claim or defense. Experience in the federal courts has shown this practice of pre-trial examination of witnesses to be most effective in aiding court, client and counselor.

—Meyer Kirschenbaum, Esq., Member of New York Bar.

Willard T. Simmons, President of El Paso Bar, Dies

Willard Simmons, only lately elected president of the El Paso County Bar, died, after a brief illness, on October 21st.

Judge Simmons was born in Illinois in 1870, and graduated in law from the University of Kansas in 1896. He entered the practice of law in Norton, Kansas, where he was city attorney four terms, was appointed judge of the 17th Judicial District in Kansas in 1920, was elected to the full term which he served until 1927.

In 1928 he moved to Colorado Springs, where he has been engaged in the practice of law until his death.

Judge Simmons was active in the El Paso County Bar Association, served as attorney for receiver of one of the defunct building and loan associations, and was an ardent sportsman until his death.

—Charles J. Simon, Correspondent.

Clarence C. Hamlin

Clarence Clark Hamlin, of the El Paso County Bar, died, October 29th, after an illness of nearly a year.

Mr. Hamlin was publisher of the *Gazette* and *Telegraph*, morning

and evening papers of Colorado Springs, and had been retired from active practice of law for a number of years.

He was born in Manchester, Iowa, January 7, 1868, graduating from the University of Iowa in 1890, with a degree of doctor of laws.

He practiced in Wyoming, serving two terms as state senator, and as a member of the commission to revise the Wyoming statutes. In 1896 he moved to Colorado Springs, first associated with the law firm of the late Judge Allen T. Gunnell.

He was elected district attorney in 1906, and served one term during the troublesome days of the Cripple Creek strike. He served as Republican National Committeeman from 1924 to 1932, and was a close friend of Presidents Harding, Coolidge and Hoover.

Mr. Hamlin was the last of a number of builders of this community, numbering among others, Spencer Penrose, C. M. McNeil, Eugene P. Shove, A. E. Carlton, L. G. Carlton, and O. H. Shoup, with whom he was closely associated. *—Charles J. Simon, Correspondent.*

PROBATE REVISION

William E. Hutton, President of the Colorado Bar Association, has announced the appointment of a committee of the Colorado Bar Association to cooperate with a similar committee of the Colorado County Judges Association appointed by Judge C. Edgar Kettering, President of that association, to receive and compile suggestions for changes in the present Colorado probate laws and submit suggested amendments to the Colorado Legislature.

All members of the Bar and all county judges having suggested changes to make in the probate laws are requested to convey their suggestions to a member of one of these committees. Inasmuch as the committees have before them the remarks made by the various speakers at the Colorado Bar Association meeting, it will not be necessary to forward any of the suggestions made there to the committees.

CURRENT TAX DEVELOPMENTS

Discussed by ALBERT J. GOULD

LIQUIDATING CORPORATIONS EXEMPT FROM CAPITAL STOCK TAX

In view of the present trend toward liquidation of corporations, Washington, Baltimore & Annapolis Realty Corp. v. Commissioner (D. C. Md.), 10-23-40, and S. Makransky & Sons, Inc. v. U. S. (D. C. E. D. Pa.), 10-14-40, are of interest because they hold that corporations whose activities are confined to liquidation are not doing business and are exempt from the capital stock tax, even though the liquidation has not been completed during the month of July, when the capital stock tax return is required to be filed.

In the Makransky case the "operating assets" had been disposed of, but life insurance policies on the lives of the officers remained and income was received from sale of securities and dividends thereon.

TRUST LEGAL EXPENSES NOT DEDUCTIBLE

In trust of Carl Hicks White v. Commissioner (C. C. A. 3), 10-9-40, affirming 40 B. T. A. 663, the court said: "It seems now to be clear that the investing and reinvesting of assets, either by an individual for himself or by trustees on behalf of a trust estate, is pretty definitely determined not to constitute the carrying on of business," and held upon the theory that legal expenses incurred in construing the terms of the trust were not deductible by the trustees.

Some similar and related cases are: Deputy v. Dupont, 308 U. S. 488; City Bank v. Commissioner, 112 F. (2d) 457; Higgins v. Commissioner, 111 F. (2d) 795; Adams v. Commissioner, 110 F. (2d) 578.

DEDUCTIBILITY OF ATTORNEY'S FEES

Whether attorney's fees are deductible from income in connection with administration of an estate depends upon whether the estate is "doing business."

An interesting decision, which contains a rather complete discussion of the problem is Herbert Rivington Pine, et al. vs. U. S., U. S. Court of Claims, No. 44007, 10-7-40, Prentice-Hall, paragraph 62894.

In this case the court held attorney's fees were deductible because the executors were charged with the duty of managing large investments, and consequently were "doing business."

Boulder County Bar Entertains

The Boulder County Bar Association was host to members of the bar of the Eighth Judicial District at a Denver meeting in the Boulderado Hotel on November 18th. Guests of the local bar association also included Chief Justice Benjamin C. Hilliard, Dean Edward C. King, William E. Hutton, and Wm. Hedges Robinson, Jr. Dean King delivered an excellent paper upon recent trends in constitutional interpretation as shown by the tax decisions.

Chief Justice Hilliard gave a resume from a speech which he later delivered at Iowa: "Still, Nobody Knows the Law." Mr. Hutton briefly reviewed the progress of the state association and urged all lawyers to extend the membership of the bar associations so that they would include every lawyer in the state.

In excess of fifty lawyers attended the meeting, which honored the selection of Mr. King as the new Dean of the University of Colorado Law School. Before the dinner, members of the bar gathered before a bar well stocked by the Boulder association.

The Boulder County Bar Association has a committee working on the establishment of a uniform practice before the probate court of the county, which committee is to report at the next regular meeting to be held in Longmont on December 16th. At that time it is expected the recommendations of the committee of the Colorado Bar Association on probate procedure will be considered by the local association.

—Harlan Howlett, Correspondent.

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